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November 23, 1993

Office of the Secretary
Federal Communications Commission
1919 "M" Street
M.W., Washington DC 20554

Re: PP Docket No. 93-253
Section 309 (j) Rule Making

I am submitting comments to the proposed auction rules as a small business person who has operated both privately and publicly held companies for the past 35 years. Among these are two companies which have been awarded RSA Cellular Telephone licenses. My comments are as follows:

Auction Design

Electronic bidding (#39), while perhaps appropriate for the auctioning Treasury securities to major financial institutions who submit multiple bids on a weekly basis, places a great burden on small businesses who may not have access to the infrastructure required for electronic bidding, and who only wish to bid on a handful of markets in one auction session dealing with markets in the state in which they do business. It is not an "open" process.

Sealed bids where the Commission expects very few bidders (#49) is a departure from open bidding, and therefore undermines public confidence in the process. It increases the possibility of bidder collusion: the possibility of collusion increases as the number of bidders gets smaller. Finally, what are the markets which are going to have very few bidders? As market size declines, more small business bidders will bid. If anything, small markets will attract more bidders, not fewer.

Simultaneous sealed bidding (#55) creates problems because of the problems of overall ceilings and having to permit bidders to withdraw bids. If sealed bids undermine public confidence in the process, simultaneous sealed bidding just makes it worse.

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Auction Design (Cont'd)

Simultaneous ascending bid electronic auctions (#56 & #62) assumes that the major players are to be the sole beneficiary of the auction process. It assumes that there will be no open auction. It discriminates against small business. The creation of such a system would take more time than the Commission has for this proceeding. Keep it simple.

A "Final and best" offer (#60) is worse still from the point of view of the small business bidder. He may lose the market for which he has offered the highest bid, not because the major player particularly wantsw that market, but because the major player is willing to raise his bid for the major market in the region for which it submitted the initial sealed bid. This runs directly counter to the principal of disseminating licenses among a wide variety of applicants, including small business (#11).

Minimum Bid Requirements (#66 & #67) places the Commission in the position of determining value in a proceeding specifically designed for value to be determined by the auction process. Failure of bidders to meet a predetermined value simply delays service to the public until such time as the Commission has reduced the minimum bid to the point where it reflects true market value.

A combination of initial payment plus royalties (#70) would be an ideal formula because payment of, say, a 5% of gross revenue royalty would precisely match payments to market revenues. There is a strong public policy appeal for the treasury to receive an ongoing revenue stream from the operation of spectrum that is a national asset.

The Eligibility Criteria (#77) should be for the purposes of establishing a maximum, e.g. not more than a net worth of $6.0 million and earnings of not more than $2.0 million, so that large operators will be excluded from the qualifying class.

Minimum financial requirements should be determined on a service by service basis. And, even then, account must be taken of the fact that a compact market of 100,000 population may be capable of being served by one cell, and require a relatively small investment, compared to a market with millions covering a large geographic area.

Auction Design (Cont'd)

Unjust enrichment from auctions (#83 & #88) has been an issue in the cellular lotteries because of the Commission's rules which permitted the sale of a construction permit or license without taking any steps to build or operate the market. Rather than involve the Commission in the quagmire of determining market value, the better approach is to prohibit transfers for a three year period after the award of a license. In these circumstances, forbidden transfers would cause the license to cancel automatically (#88).

Collusion (#93) is most likely among the largest firms. There is already a suspicion among the general public that these large firms will divide up the country by informal agreement and bid for major markets accordingly. At the same time, collusion is easy to allege and hard to prove. Overall, it is another quagmire that the Commission should avoid. Most effective would be to obtain a commitment from the Justice Department that it will establish a task force to monitor the auction results and prosecute violators under existing law.

In the event that **a winning bidder is found to ineligible, unqualified or unable to pay** the remaining 80% (#113), the market should be re-auctioned as indicated above. The market should be open for bidding by all applicants who were eligible for the first auction, whether or not they actually participated. The Commissions, objective is to have as many qualified bidders as possible at each auction session.

Specific Services

PCS and designated entities (#121). If the Commission is going to set aside two spectrum blocks for designated entities, then the use of royalty payments as the exclusive method of payment would be appropriate for the reasons previously set forth. If the commission does not approve royalty payments then installment payments would be appropriate.

When bidding for non set aside spectrum, designated entities should be able to make payment using the installment payments. This is particularly important in encouraging small business to provide service in smaller markets where the major operators would otherwise be warehousing spectrum while then build the major markets.

Specific Services (Cont'd)

Consortia should be accorded designated entity status only when a majority of the ownership and control is in the hands of designated entities.

PCS Narrowband (#122) Licenses should be open to all applicants, and designated entities should be entitled to use installment payments.

The determination that IVDS should be subject to auction rules needs to be reconsidered (#143). Since IVDS was authorized, the industry has begun to move in a different direction from that originally contemplated. The business plans of a number of IVDS service providers contemplate "free" access to the IVDS system for any customer who owns an appropriate box. There would be no charge to the customer for connection to the system or for system time used.

The costs would be paid by the vendors of goods and services offered to customers via IVDS. In this respect, IVDS looks much more like broadcast television, which is paid for by the vendors of goods and services, than like, for example, cellular telephone service, where the customer pays for connection time.

Because no IVDS systems are yet in service, the degree to which this trend in the IVDS industry becomes the primary operational reality is as yet unknown. If, in fact, IVDS is offered as a no connection charge and no time charge service, then the Commission is mandated under the rules established by Congress to award IVDS spectrum by lottery and not by auction. This commentator requests reply comments from prospective IVDS service providers on their proposed operational plans, so that the Commission can have the facts available upon which to base a conclusion on the primary use of the IVDS spectrum.

Very truly yours,

David F. Swain

DFS:mj